Supreme Court, U.S.
FILED
95 1349 FEB 20 1996
OFFICE OF THE CLERK

No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTURO MORALES, Petitioner

v.

INDUSTRIAL COMMISSION OF ARIZONA,
HIDRO GAS, and
RELIANCE INSURANCE COMPANY, Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS, STATE OF ARIZONA,
DIVISION ONE

APPENDIX

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APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ARTURO MORALES, Petitioner, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, HIDOR GAS, Respondent Employer, RELIANCE INSURANCE COMPANY, Respondent Carrier	)	1 CA-IC 94-0033 DEPARTMENT A ICA CLAIM NO. 92329241562 CARRIER NO. 092-92-52278 O R D E R

The above-mentioned matter was duly submitted to the Court. The Court has this day rendered its Memorandum Decision.

IT IS ORDERED that the Memorandum Decision be filed by the Clerk.

IT IS FURTHER ORDERED that a copy of this order together with a copy of the Memorandum

Decision be sent to each party appearing herein or the attorney for such party and to Administrative Law Judge JoAnn C. Gaffaney.

DATED this 30th day of May, 1995.

/s/
Rudolph J. Gerber, Judge

ORDER
1 CA-IC 94-0033

DEPARTMENT A

ICA CLAIM NO. 92329241562
CARRIER NO. 092-92-52278

A true copy of the foregoing
was mailed this April 10, 1995, to:

Mr. David L. Curl,
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2501 North Mesa
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Attorneys for Petitioner

Mr. James F. Scheer,
Mr. Jeffrey B. Pownell
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800 West Washington
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Attorneys for Respondent

Mr. R. Todd Lundmark,
LONG, LUNDMARK & POPPE, P.A.
P O Box 33997
Phoenix, AZ 85067-3397
Attorneys for Respondent Employer and Carrier

GLEN D. CLARK, CLERK
By

/s/
Deputy Clerk

Honorable JoAnn C. Gaffaney
Administrative Law Judge
INDUSTRIAL COMMISSION OF ARIZONA
800 West Washington Street
Phoenix, AZ 85007

Glen D. Clark, Clerk
By

/s/
Deputy Clerk

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ARTURO MORALES,	)	
	)	
Petitioner,	)	1 CA-IC 94-0033
	)	
v.	)	DEPARTMENT A
	)	
THE INDUSTRIAL COMMISSION	)	MEMORANDUM
	)	DECISION
OF ARIZONA,	)	(Not for
	)	Publication -
Respondent,	)	Rule 28, Arizona
	)	Rules of Civil
	)	Appellate
	)	Procedure)
HIDRO GAS,	)	
	)	
Respondent Employer,	)	
	)	
RELIANCE INSURANCE COMPANY,	)	
	)	
Respondent Carrier	)	
	)	
	)	

Special Action--Industrial Commission

ICA CLAIM NO. 92329241562

CARRIER NO. 092-92-52278

Administrative Law Judge JoAnn C. Gaffaney

AWARD AFFIRMED

Studdard & Melby
by David L. Curl
Attorneys for Petitioner El Paso, Texas

Scherr & Legate, P.C.
by James F. Scherr
and Jeffrey B. Pownell
Admitted Pro Hac Vice Attorneys
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Anita R. Valainis, Chief Counsel
The Industrial Commission of Arizona
Attorney for Respondent Phoenix

Long, Lundmark & Poppe, P.A.
by R. Todd Lundmark
Attorneys for Respondents Employer
and Carrier Phoenix

G E R B E R, Judge

Arturo Morales (Morales) seeks review of the Arizona Industrial Commission's (Commission) decision that dismissed his workers' compensation claim because of unexcused untimeliness under Arizona Revised Statutes Annotated (A.R.S.) section 23-1061(A) (1995). For reasons that follow, we affirm the decision.

PROCEDURAL AND FACTUAL HISTORY

Morales is a Mexican citizen who resides in Juarez, Mexico. Respondent Employer, Hidro Gas, is a Mexican corporation located in Juarez with an office in El Paso, Texas.

In 1983, Hidro Gas hired Morales in Mexico to work as a driver in Texas.[1] The job required Morales to obtain a Texas driver's license and drive trucks bearing Texas license plates. In November 1989, Hidro Gas assigned him a new route from Tijuana, Mexico to Peoria, Arizona.

On July 18, 1990, while driving to Peoria, Morales lost control of his truck and rolled off the interstate highway near Gila Bend, Arizona. As a result of injuries sustained in the accident, he was hospitalized in Yuma, Arizona for about seven days.[2] He then returned to Mexico, where he received benefits under the Mexican social security

system.

Hidro Gas did not report the injury to the commission or

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[1] The record is unclear whether Hidro Gas came to Mexico from Texas to recruit Morales or recruited him from Mexico. The record also is unclear whether Morales's initial route originated in Juarez, Mexico or El Paso, Texas.

[2] The record does not reveal whether the attending physicians in the Yuma hospital reported the injury to the Commission. See generally A.R.S. [section] 23-908(A) (Supp. 1994).

[next page]

provide Morales information about its workers' compensation carrier. See generally A.R.S. [sections] 23-908(A),(F)-(G). It also did not report the injury to the Texas Workers' Compensation Commission. See generally Tex. Rev. Civ. Stat. Ann. art. 8307 sec. 7 (West Supp. 1995) (repealed effective Jan. 1, 1991) (current version at Texas Lab. Code Ann.

[section] 409.005 West Supp. 1995).

By October 1991, Morales was represented by a Texas attorney (hereinafter Scherr), who apparently filed a Texas civil suit against Hidro Gas.[3] On November 6, 1991, Morales signed a claim for Texas workers' compensation benefits.[4] On November 9, 1991, he signed a retention agreement with Scherr to represent him in the compensation claim.

On May 5, 1992, Respondent Carrier Reliance Insurance Company (Reliance) controverted the Texas workers' compensation claim, asserting that Morales did not have a Texas claim because he resided in Mexico, was recruited and hired there, and was injured in Arizona. On May 26, 1992, the Texas Workers' Compensation Commission denied the claim for insufficient evidence that Morales's employment brought him within the Texas Workers'

[3] At the hearing, Morales's Arizona counsel stated, "I have a document that's dated October of 1991 which shows there is a lawsuit filed in El Paso . . . Arturo Morales versus Hidro Gas, Juarez. The claim file there is 91-12057, which shows that it was filed on behalf of Mr. Morales by Mr. Scherr."

[4] The record does not reveal when this claim was filed with the Texas Workers' Compensation Commission.

[next page]
Compensation Act.[5]

On November 23, 1993, while represented by Scherr, Morales filed a Worker's Report of Injury for the July 1990 injury with the Commission. Nothing in this claim suggests that he was claiming Texas rather than Arizona workers' compensation benefits. On April 5, 1993, Reliance denied the claim. Morales thereafter timely requested a hearing. By August 10, 1993, Scherr had associated with Arizona counsel to represent Morales before

the Commission. On August 12, 1993, before the first scheduled hearing, Reliance raised the affirmative defense of an untimely claim.

At the ensuing hearing, Morales alone appeared. Before he testified, his attorney responded to the affirmative defense by arguing that:

> [Morales] did not know that he had the industrial accident here in Arizona. He thought it was a Texas, or at least he was informed it was a Texas industrial injury and that was the reason it was not timely filed. It was filed in Texas and was not filed in Arizona until a defense was made that it was not a -- that Texas did not have jurisdiction. It was then filed up here.[6]

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[5] Morales did not present evidence concerning any appeal to this May 26, 1992 order. Respondents have submitted a July 13, 1992 Summary Judgment Motion in the District Court of El Paso County, Texas, which apparently is a response to Morales's appeal of the May 26, 1992 order in the District Court. The disposition of that appeal, and any further appeal, is not part of the current record.

[6] The Texas claim, however, was filed more than a year after the industrial injury. An

Arizona claim therefore would have been untimely if Morales had filed in Arizona rather than in Texas. See A.R.S. [section] 23-1061(A). The Texas claim may have been timely because under Texas law, the one-year period for filing a claim begins to run only if the employer reports the injury to the Texas Workers' Compensation Commission. See Tex. Rev. Civ. Stat. Ann. art. 8307 sec. 7a (West Supp. 1995) (repealed effective Jan. 1, 1991) (current version at Texas Lab. Code Ann. [section] 409.008 West Supp. **[footnote continues on next page]**

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[next page]

Morales initially explained that he had delayed filing a workers' compensation claim in Arizona because he was bedridden for a year after the July 18, 1990 injury. He then testified that he did not realize he could file in Arizona until Scherr advised him of this right sometime after the Texas claim was denied. After talking to a Mexican attorney, Morales personally filed the Texas claim.[7] However, he acknowledged that he first met Scherr a few days before filing the claim and that he based his actions on his attorney's

advice. His Arizona attorney confirmed that Scherr had represented Morales in the civil action filed before the November 1991 Texas workers' compensation claim and avowed "that I was told by the secretary of Mr. Scherr that their records indicated that there was mention of representation in March of '91."[8] Finally, Morales acknowledged that neither Hidro Gas nor Reliance ever advised him not to file an Arizona claim.

The Administrative law Judge (ALJ) then issued the award dismissing Morales's claim because of unexcused untimeliness. She

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1995). In this appeal, Reliance contends that the employer reporting requirement applies only if a claimant is a Texas employee. According to Reliance, because Morales was not a Texas employee, Hidro Gas did not have to report his injury in Texas, and the Texas claim therefore was untimely filed in Texas as well. We have not found Texas case law addressing this issue and also note that Reliance relies on an amended version of the Texas statute that became effective on September 1, 1993. See Texas Lab. Code Ann.

[section] 409.005(f) West Supp. 1995 (creating good cause exception to administrative violation for failing to report injury).

[7] In his deposition, Morales explained that he thought he had a Texas claim because the trucks that he drove had Texas license plates and Hidro Gas had an office in Texas.

[8] Counsel also stated that Morales's sister, who was at the hearing and present when he saw Scherr, confirmed his avowal.

[next page]
found that Morales was hired by Hidro Gas in Mexico, that Morales had sought representation from Scherr as early as March 1991, and that he relied on his attorney's advice in filing the November 6, 1991 Texas workers' compensation claim. She then concluded by stating:

> The evidence clearly establishes that the applicant's claim was filed in Arizona after the one year statute of limitations had run. Although the applicant alleges that he was laid up during that period of time, the evidence establishes that the Arizona claim was not filed until the Texas claim was at issue. Furthermore, the applicant was acting under the advise [sic] of an attorney as early as March,

> 1991, well within the one year filing period. Therefore, the undersigned finds that the applicant has failed to meet his burden of proof to show that he should be excused from the untimely filing of his Arizona claim.

Morales requested review. He argued that because the purpose of a statute of limitations is to provide notice of a "contention of an injury" and the Texas workers' compensation board fully notified Respondents "of the facts of the incident and action," Respondents were equitably estopped to assert the defense of an untimely claim. He also argued that the award penalized him for making a wrong choice of forum, that the limitations period should have been tolled while he pursued the Texas claim, and that the ALJ "did not apply the full faith and credit clause of the United States Constitution and give meaning to the Texas statute which compels the tolling of any statute of limitation during the period of time a claim

is being litigated in the wrong jurisdiction."

After the ALJ affirmed her prior decision without modification, Morales brought this special action. We grant his request for representation by Texas counsel, including Scherr, in

[next page]
this appeal. We have jurisdiction under A.R.S. section 23-943(H) and R.P.S.A. Rule 10 (Supp. 1995).

DISCUSSION

On review, Morales presents eight issues, which we summarize as follows:

> (1) whether Hidro Gas's failure to report the injury to the commission is a material misrepresentation that excuses the late claim under A.R.S. section 23-1061(A);
>
> (2) whether this same failure prevented the claim from accruing or from being "compensable" under section 23-1061(A);
>
> (3) whether Texas law applies to this claim under A.R.S. section 23-904(B);

(4) whether the Texas statute of limitations and tolling provision applies under Brandler v. Manuel Trevizo Hay Co., 154 Ariz. 96, 740 P.2d 958 (App. 1987);

(5) whether Reliance waived the untimely claim defense under section 23-1061(D) by not raising it in Texas;

(6) whether A.R.S. section 12-504(A), Arizona's civil savings statute, applies to Morales's workers' compensation claim;

(7) if Hidro Gas's failure to report the injury does not excuse the late claim, whether 23-1061(A) unconstitutionally deprives Morales of due process of law; and

(8) whether the Full Faith and Credit Clause compels the Commission to apply Texas law to this claim.

Reliance argues that Morales failed to preserve all of these issues for review, and further, that the issues have no merit.

A. Preservation for Appeal

As a general rule, unless a party calls attention to an error on administrative review, appellate review is limited to "(1) those matters which are extant in the record, such as objections to evidence, and (2) the

issue which is fundamental on review, that is, the sufficiency of the evidence to support the decision." Stephens v. Industrial Comm'n, 114 Ariz. 92, 95, 559 P.2d 212, 215 (App. 1977). An exception to this rule applies "if the question [raised for the first time on appeal] is one of 'a general public nature, affecting the interests of the state at large' . . . ." Ruth v. Industrial Comm'n, 107 Ariz. 572, 574, 490 P.2d 828, 830 (1971) (quoting South Tucson v. Board of Supervisors of Pima County, 52 Ariz. 575, 583, 84 P.2d 581, 584 (1938)). Ruth involved a consolidated disposition of eight separate cases that challenged Arizona's lien statute because it did not require a compensation carrier to share the cost of a claimant's third-party action. Id. at 573, 490 P.2d at 829. The supreme court "consider[ed] the question of the constitutionality of a vital provision of the

Workman's Compensation Act an issue of general statewide significance." Id. at 574, 490 P.2d at 830.

In the current case, Morales failed to present to the ALJ most of the issues that he now raises on appellate review: that Hidro Gas or Reliance had made a misrepresentation and that he had relied upon it; that his claim had not accrued; that his claim was not "compensable"; that Reliance had waived the defense of an untimely claim; and that the one-year claim period under A.R.S. section 23-1061(A) denied him due process. Further, he never asserted that the ALJ should have applied A.R.S. section 23-904(B) or A.R.S. section 12-504(A).

In his reply brief, Morales argues that the Ruth exception

[next page]

applies to these issues because they concern

the interpretation of Arizona statutes and the constitutionality of [section] 23-1061(A).

We disagree that the current case is comparable to Ruth. Ruth addressed an issue that affects every workers' compensation claimant who also has a third-party civil remedy. The current case will affect few claimants other than Morales. Further, many cases present an issue of statutory interpretation. Expanding Ruth to every issue of interpretation would create an exception that swallows the rule requiring a party to exhaust administrative remedies before raising an issue on appeal.

We therefore conclude that Morales failed to preserve issues 1,2 and 3 and issues 5, 6 and 7 as summarized previously. We address issues 4 and 8.

B. Merits of Preserved Issues

As to issue 4, Morales asserts that the

ALJ should have applied the Texas limitations period and savings statute to his Arizona workers' compensation claim.[9] To support the applicability of Texas law, he cites Brandler v. Manuel Trevizo Hay Co., 154 Ariz. 96, 740 P.2d 958 (App. 1987).

Brandler is a civil case applying Arizona's two-year statute of limitations to a California workers' compensation claimant's third-party action in Arizona against an Arizona defendant. Id. at 96-101, 740 P.2d at 958-63. This case does not imply that an

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[9] We note that under Texas law, the civil savings statute does not apply to a Texas workers' compensation claim. See Pan American Fire & Casualty Co. v. Rowlett, 479 S.W.2d 782, 783 (Tex. Ct. App. 1972).

[next page]

Arizona ALJ should apply Texas law to an Arizona workers' compensation claim. To the contrary, the general rule is that the state

in which a claimant claims compensation applies its own law to the claim.[10] See 4 Arthur Larson, The Law of Workmen's Compensation [sections] 84.21, at 16-3, 84.23, 84.24, at 16-13 (1995); cf. Farias v. Mattel, Inc., 153 Ariz. 113, 114-15, 735 P.2d 143, 144-45 (App. 1986) (applying Florida workers' compensation exclusive remedy law to dismiss Arizona civil action against Florida employer) (citing 4 Larson, [section] 88.11 (1986)); Quiles v. Heflin Steel Supply Co., 145 Ariz. 73, 74-79, 699 P.2d 1304, 1305-1310 (App. 1985) (Greer, J., dissenting) (applying California workers' compensation law governing right to third-party claim brought by workers' compensation carrier in Arizona and applying Arizona law governing relation back of claimant's complaint in intervention). We therefore disagree that Arizona case law required the Arizona ALJ to apply Texas law to

Morales's Arizona workers' compensation claim.

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[10] Arizona is one of only three states with a special statutory provision permitting the forum state to apply sister state law. See 4 Larson, [section] 84.27. The Arizona Supreme Court has interpreted A.R.S. [section] 23-904(B) to apply only if Arizona does not have jurisdiction to apply Arizona law to the claim, i.e., when the claimant was not hired or regularly employed in Arizona or the injury did not occur in Arizona. See Ocean Accident & Guarantee Corp. v. Industrial Comm'n, 32 Ariz. 275, 284-85, 257 P. 644, 647 (1927); accord Collins v. American Buslines, Inc., 79 Ariz. 220, 224, 286 P.2d 214, 217 (1955) (confirming that Arizona has jurisdiction to apply Arizona law to injury occurring in Arizona) (overruling Industrial Comm'n v. Watson Bros. Transp. Co., Inc., 75 Ariz. 357, 363, 256 P. 2d 730, 733 (1953)), overruled on other grounds by 350 U.S. 528 (1956). But cf. Arizona Workers' Compensation Handbook [section] 13.2.3.2 (stating that section 23-904(B) applies to injury occurring in Arizona) (Ray J. Davis et al., eds. 1992).

[next page]

As to issue 8, Morales argues that the Full Faith and Credit Clause compelled the Arizona ALJ to apply the Texas limitations period and savings statute to the Arizona

claim. See generally U.S. Const. art. IV, [section] 1. To the contrary, the constitution does not compel a forum state to apply sister state law so long as the forum state has jurisdiction to apply its own law to the claim. See, e.g., Carroll v. Lanza, 349 U.S. 408 (1955) (concluding that Full Faith and Credit Clause does not require state of injury to apply sister state's law); accord 4 Larson, [sections] 86.00 to 86.35; Restatement (Second) of Conflict of Laws [section] 181 (1971); Arizona Workers' Compensation Handbook, [section] 13.2.2.1. Under this rule, "the test is not whether the interest of the forum state is relatively greater, but only whether it is legitimate and substantial in itself." 4 Larson, [section] 86.35, at 16-61 (footnote omitted).

CONCLUSION

For the foregoing reasons, we affirm the

ALJ's decision that dismissed Morales's Arizona workers' compensation claim for unexcused untimeliness.

/s/
Rudolph J. Gerber, Judge

CONCURRING:

/s/
Sheldon H. Weisberg, Presiding Judge
Department A

/s/
William F. Garbarino, Judge

APPENDIX B

SUPREME COURT
State of Arizona
402 Arizona State Courts Building
1501 West Washington
Phoenix, Arizona 85007-3329
Telephone: (602) 542-8395

November 22, 1995
RE: ARTURO MORALES VS. INDUSTRIAL COMMISSION OF ARIZONA/HIDRO GAS et al
Supreme Court No. CV-95-0315-PR
Court of Appeals No. 1 CA-IC 94-0033
Industrial Claim No. 92329241562
Carrier No. 092-92-52278

GREETINGS:
The following action was taken by the Supreme Court of the State of Arizona on November 21, 1995, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED

FURTHER ORDERED: Request for Attorneys' Fees [Morales] = DENIED.

Record returned to Court of Appeals, Division One, Phoenix, this 22nd day of November, 1995.
NOEL K. DESSAINT, Clerk
TO: David L. Curl, Esq., Studdard & Melby
James F. Scherr, Esq. and Jeffrey B. Pownell, Esq., Scherr & Legate, P.C.
Anita R. Valainis, Chief Counsel, Industrial Commission of Arizona
R. Todd Lundmark, Esq., Long, Lundmark & Poppe, P.A.
Glen D. Clark, Clerk, Court of Appeals, Division One
Lexis-Nexis
West Publishing Company

APPENDIX C
BEFORE THE INDUSTRIAL COMMISSION OF ARIZONA

ARTURO MORALES Applicant, vs. HYDRO GAS Defendant Employer, RELIANCE INSURANCE COMPANY Defendant Insurance Carrier	ICA CLAIM NO. 92329241562 SOCIAL SECURITY #111-00-0001 CARRIER CLAIM NO. 092-92-52278 DATE OF INJURY: 07/18/90 **DECISION UPON HEARING AND FINDINGS AND AWARD DENYING COMPENSABILITY FOR LACK OF JURISDICTION**

The applicant alleges that he sustained an industrial injury on July 18, 1990. On November 23, 1992, the applicant filed a Workers' Report of Injury with the Industrial Commission of Arizona. On April 5, 1993, the defendant carrier denied the claim. Applicant filed a timely Request for Hearing. Before the hearing, the defendant insurance carrier raised the jurisdictional issue. Formal

hearing was convened on November 15, 1993, in Phoenix, Arizona. The applicant is represented by Mr. Lawrence Nicholls. The defendants are represented by Mr. Todd Lundmark.

The undersigned, having fully considered the file, records and all relevant matters, now enters her FINDINGS AND AWARD as follows:

[next page]
ARTURO MORALES

F I N D I N G S

1. The issue is whether the Industrial Commission has jurisdiction to consider the merits of the applicant's claim since his claim was filed untimely pursuant to the statute of limitations provided in A.R.S. [section] 23-1061 (A). Applicant has the burden of proof as to all the essential elements of the claim. In Re Estate of Bedwell, 104 Ariz. 443, 454 P.2d 985 (1969);

Malinski v. Industrial Commission, 103 Ariz. 213, 439 P.2d 485 (1968).

2. Arizona Revised Statute [section] 23-1061(A) provides:

> . . .[N]o claim for compensation shall be valid or enforceable unless the claim is filed with the commission by the employee. . .in writing within one year after the injury occurred or the right thereto accrued. The time for filing a compensation claim begins to run when the injury becomes manifest or when the claimant knows or in the exercise of reasonable diligence should know that he has sustained a compensable injury. Except as provided in subsection B of this section, neither the commission nor any court shall have jurisdiction to consider a claim which is not timely filed under this subsection, except if the employee or other party entitled to file the claim has delayed in doing so because of justifiable reliance on a material representation by the commission, employer or insurance carrier or if the employee or other party entitled to file the claim is insane or legally incompetent or incapacitated at the time the injury occurs or the right to compensation accrues or during the one-year period thereafter. If the insanity or legal incompetence or incapacity occurs after the one-year period has commenced, the running of the remainder of the one-year period shall be suspended during the period of insanity

or legal incompetence or incapacity. If the employee or other party is insane or legally incompetent or incapacitated when the injury occurs or the right to compensation accrues, the one-year period

commences to run immediately upon the termination of insanity or legal incompetence or incapacity. . .

3. Applicant testified that he was injured while driving a truck for Hydro Gas on July 18, 1990. In 1983, he was hired by Hydro Gas in Juarez, Mexico. According to the applicant, the defendant employer is a Mexican company with offices in El Paso, Texas. Applicant worked for a few years in Texas. However, at the time of the accident, applicant was working in Tijuana, Mexico. He would drive to Peoria, Arizona and then back to Tijuana. The applicant testified that he

had been driving this route daily since November 1989. Applicant testified that he had a home in Juarez, Mexico. The accident occurred in Yuma, Arizona. The applicant was hospitalized for seven days in a Yuma hospital. Thereafter, he was taken to Juarez, Mexico. Applicant testified that he first contacted a lawyer in Juarez, Mexico to help him receive benefits. He was then referred to a lawyer in El Paso, Texas. Applicant filed a Workers' Compensation Claim in Texas on November 6, 1991, upon the advise of his attorney. The claim was denied. The applicant sought representation from Texas counsel as early as March, 1991.

4. The evidence clearly establishes that the applicant's claim was filed in Arizona after the one year statute of limitations had run. Although the applicant alleges that he was laid up during that period

of time, the evidence establishes that the Arizona claim was not filed until the Texas claim was at issue. Furthermore, the applicant was acting under the advise of an attorney as early as

[next page]

March, 1991, well within the one year filing period. Therefore, the undersigned finds that the applicant has failed to meet his burden of proof to show that he should be excused from the untimely filing of his Arizona claim.

A W A R D

1. The applicant's claim is denied for the reason that the Industrial Commission lacks jurisdiction.

- - - - - - - - - - - -

NOTICE: Any party dissatisfied with this Award may file a written request for review of the same with the Administrative Law Judge Division of the Industrial Commission within THIRTY (30) DAYS after the mailing of this Award as provided by Arizona Revised Statutes, Sec. 23-942 D and 23-943 A and B. Unless such written request is made within the time provided, this Award is final.

By /s/
JOANN C. GAFFANEY
Administrative Law Judge

jw
DATED AND MAILED IN PHOENIX, ARIZONA ON DECEMBER 7, 1993.

APPENDIX D
BEFORE THE INDUSTRIAL COMMISSION OF ARIZONA

ARTURO MORALES	ICA CLAIM NO. 92329241562
Applicant,	SOCIAL SECURITY #111-00-0001
	CARRIER CLAIM NO. 092-92-52278
	DATE OF INJURY: 07/18/93
vs.	
	DECISION UPON REVIEW AFFIRMING DECISION UPON HEARING AND FINDINGS AND AWARD DENYING COMPENSABILITY
HIDRO GAS	
Defendant Employer,	
RELIANCE INSURANCE COMPANY	
Defendant Insurance Carrier.	

On December 7, 1993, DECISION UPON HEARING AND FINDINGS AND AWARD DENYING COMPENSABILITY was issued by the undersigned. On January 6, 1994, REQUEST FOR REVIEW was filed by applicant. On January 21, 1994, counsel for defendants filed RESPONSE TO REQUEST FOR REVIEW.

The undersigned, having fully reconsidered the file, records and all matters

hereto pertaining, now enters her DECISION UPON REVIEW AFFIRMING DECISION UPON HEARING AND FINDINGS AND AWARD DENYING COMPENSABILITY as follows:

F I N D I N G S

That the DECISION UPON HEARING AND FINDINGS AND AWARD DENYING COMPENSABILITY entered on December 7, 1993, is fully supported by the evidence and is hereby affirmed.

[next page]

A W A R D

IT IS ORDERED that the DECISION UPON HEARING AND FINDINGS AND AWARD DENYING COMPENSABILITY entered on December 7, 1993 is affirmed.

- - - - - - - - - - -

NOTICE: Any party dissatisfied with this Decision Upon Review may apply to the Court of Appeals of the State of Arizona, Division One, for a review of the lawfulness of this Decision pursuant to the provisions of Arizona Revised Statutes, Secs. 23-951 A and 12-120.21 B. See also Rules 10, Rules of Procedure for Special Actions, Arizona Revised Statutes, 17A. Unless such application is made within THIRTY (30) DAYS after the mailing hereof, this Decision shall be final. Arizona Revised Statutes, Sec. 23-943 H.

By /s/
JOANN C. GAFFANEY
Administrative Law Judge

jw

DATED AND MAILED IN PHOENIX, ARIZONA ON FEBRUARY 1, 1994.

APPENDIX E

Lawrence P. Nicholls, Esq.
Nicholls & Stillwell
822 E. Osborn, Ste. 120
Phoenix, AZ 85014
Telephone: (602) 234-2123
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Attorney For: Arturo Morales

BEFORE THE INDUSTRIAL COMMISSION OF ARIZONA

ARTURO MORALES, Applicant, HIDRO GAS, Defendant Employer, RELIANCE INSURANCE COMPANY, Defendant Carrier	ICA NO: 92329241562 CLAIM NO: 092-92-52278 DATE OF INJURY: 07/18/93 **REQUEST FOR REVIEW**

COMES NOW, the Applicant, by and through his undersigned attorney and requests the Presiding Administrative Law Judge to review the Decision Upon Hearing and Findings and Award denying compensability issued on December 7, 1993. The Applicant alleges that

the Findings and Award of the Administrative Law Judge is based upon a finding that although the Defendants were fully aware and fully notified of the facts of the incident and action by means of a workers' compensation claim having been filed in Texas, that the Applicant cannot proceed with his claim being filed later in Arizona because of the "statute of limitations".

The Applicant alleges that the whole purpose of a statute of limitations is for the purpose of providing notification to the Defendants of an Applicant's contention of an injury.

In the instant case, the Defendants were aware of the Applicant's injuries, and were aware of all of the facts of the accident. It appears that the Administrative Law Judge has made a finding that the Applicant, a citizen of Mexico, must be deprived of his legitimate

workers' compensation benefits, because he made a wrong choice of forum.

The statute of limitation and one year statute should have been tolled during the period of time that the Texas workers' compensation claim was being pursued.

The Applicant maintains that the Administrative Law Judge did not apply the full faith and credit clause of the United States Constitution and give meaning to the Texas statute which compels the

[next page]

tolling of any statute of limitation during the period of time that a claim is being litigated in the wrong jurisdiction. (See attached copy of 16.064 of the Texas civil practice and remedies code).

The Applicant alleges that the Doctrine of Estoppel and the Doctrine of Equity demands that the Defendants not be permitted to raise

the "statute of limitations", since the Defendants themselves were fully aware of the facts of the claim, were fully aware that a claim for workers' compensation had been filed in Texas, and were not prejudiced whatsoever by the "late" filing of this claim in the State of Arizona.

RESPECTFULLY SUBMITTED this 6th day of January, 1994.

BY: /s/_____
Lawrence P. Nicholls
Attorney for the Applicant
722 East Osborn, Ste. 120
Phoenix, AZ 85014

Original of the foregoing
delivered this 6th day of
January 1994 to:

Honorable Eileen Willett
Administrative Law Judge
Industrial Commission
800 W. Washington
Phoenix, AZ 85007

Copy of the foregoing mailed
this 6th day of January, 1994, to
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/s/_____

APPENDIX F

State Bar No. 006640

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

ARTURO MORALES,	)
	)
Petitioner,	)
	)
vs.	)
	)
INDUSTRIAL COMMISSION OF ARIZONA,	)
	)
Respondent,	)
	)
HIDRO GAS,	)
	)
Respondent Employer,	)
	)
RELIANCE INSURANCE COMPANY,	)
	)
Respondent Carrier	)
	)

OPENING BRIEF OF PETITIONER

[next page]

STATEMENT OF THE CASE

On July 18, 1990, Arturo Morales sustained an industrial injury within the state of Arizona. On November 23, 1992, Mr. Morales filed a Workers' Report of Injury with the Industrial Commission of Arizona. On April 5, 1993, the Respondent Carrier, Reliance Insurance Company, denied the claim. Mr. Morales filed a timely Request for Hearing. Before the hearing, the carrier raised the jurisdictional issue.

Hearing was convened on November 15, 1993 in Phoenix, Arizona. On December 7, 1993, the Administrative Law Judge, Honorable Joann C. Gaffney, rendered her Decision Upon Hearing and Findings and Award Denying Compensability, in which Judge Gaffney denied compensability for lack of jurisdiction (See Exhibit A, attached hereto).

On January 6, 1994, Mr. Morales filed a

Request for Review (See Exhibit B, attached hereto). On January 21, 1994, the Defendant Employer Hidro Gas Juarez, S.A. and Defendant Carrier Reliance Insurance Company filed their Response to Request for Review (See Exhibit C, attached hereto). On February 1, 1994, Judge Gaffney rendered her Decision Upon Review, affirming the Decision upon Hearing (See Exhibit D, attached hereto). This appeal follows.

This Court has jurisdiction to hear this matter pursuant to A.R.S. section 23-951 and Rule 10 of the Rules of Procedure for Special Actions.

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STATEMENT OF FACTS

On July 18, 1990, Arturo Morales, while in the course and scope of his employment as a truck driver with Hidro Gas Juarez S.A., was involved in a vehicular accident on the

Interstate Highway near Gila Bend, Arizona. [R.T., p. 9:19-20.]. Mr. Morales suffered severe and extensive injuries as a result of the accident, including injuries to his knee, hip, waist, ribs, shoulder, and neck. [R.T., p. 10:19-21.] He remained in an Arizona hospital for approximately seven days following the accident, and remained immobile for approximately one year following the accident. [R.T., p. 12:12-16.]

At the time of the accident, Mr. Morales was a resident of Juarez, Chihuahua, Mexico and a citizen of the Republic of Mexico. [R.T. 11:22-25.] Mr. Morales was hired in 1983 by his employer, Hidro Gas Juarez, to work in Texas. [R.T., p. 8:13-21.] Hidro Gas Juarez maintained an office in El Paso, Texas. [R.T., p. 8:22-9:8.] Hidro Gas Juarez recruited Mr. Morales from Texas, for work in Texas. [R.T., p. 8:20-9:4.] Mr. Morales

worked in Texas for Hidro Gas Juarez for between five and six years. [R.T., p. 19:19-21.]

Mr. Morales obtained a Texas driver's license at the direction of Hidro Gas Juarez, in order to work for them. [R.T., p. 15:17-17-20.] The trucks Mr. Morales drove for Hidro Gas Juarez had Texas license plates. [R.T., p. 17:19-21.] His employer also maintained offices in El Paso, Texas. [R.T., p. 17:22-24.]

Hidro Gas Juarez maintains no office in Arizona. [R.T., p.

[next page]
14:14-16.] Mr. Morales had driven to Arizona only to pick up butane gas from AmeriGas Refinery, a supplier in Peoria, Arizona, and return with the butane gas to Tijuana, Mexico. [R.T., p. 10:7-10; 14:21-15:1.]

Mr. Morales's employer, Hidro Gas, did

not report the injury to the Arizona Industrial Commission. Indeed, Hidro Gas to this day has yet to file any written notice of the injury to the Commission.

Hidro Gas also never reported the injury to its carrier, Reliance Insurance Company. Hidro Gas also never provided Mr. Morales with notice of its carrier or policy number.

On November 6, 1991, Mr. Morales timely filed a notice of claim for worker's compensation benefits in Texas. Mr. Morales subsequently filed suit against his employer's carrier, (named Planet Insurance in the Texas proceeding), appealing the award of the Texas Workers' Compensation Commission, seeking benefits pursuant to the Texas Worker's Compensation Act, in cause number 92-7126, such case falling in the 41st Judicial District, El Paso County, Texas. By order signed January 25, 1993, the case was

consolidated into Cause No. 91-12057.

The Texas trial court subsequently granted summary judgment in favor of the carrier, on the grounds that the Texas Worker's Compensation Act failed to provide the Texas court with jurisdiction to adjudicate Mr. Morales's claim, because the injury occurred outside Texas and Mr. Morales was not a Texas resident. Mr. Morales has appealed the ruling. Such appeal is presently

[next page]
pending as No. 08-94-00053-CV, in the Court of Appeals for the Eighth Court of Appeals District of Texas at El Paso, styled Arturo Morales, Appellant v. Hidro Gas Juarez and Planet Insurance Company, Appellees.

[next page]

ISSUES PRESENTED

I. WHETHER THE EMPLOYER'S FAILURE TO REPORT THE ACCIDENT TO ITS CARRIER AND THE COMMISSION IN VIOLATION OF A.R.S. [section] 23-908(E) and 23-908(F) CONSTITUTES A MATERIAL MISREPRESENTATION, THEREBY TOLLING THE STATUTE OF LIMITATIONS PURSUANT TO A.R.S. [section] 23-1061(A)

OR

II. ALTERNATIVELY, WHETHER, SINCE THE EMPLOYER FAILED TO REPORT THE ACCIDENT TO THE COMMISSION IN VIOLATION OF A.R.S [section] 23-908(E), MR. MORALES'S CLAIM WAS "COMPENSABLE" OR THE CLAIM "ACCRUED" UNDER ARIZONA LAW ONLY WHEN THE EMPLOYER REPORTS THE INJURY IN ACCORDANCE WITH A.R.S. [section] 23-908(E) and 23-908(F).

III. WHETHER THE ADMINISTRATIVE LAW JUDGE SHOULD HAVE APPLIED TEXAS LAW TO MR. MORALES'S CLAIM, PURSUANT TO A.R.S. [section] 23-904(B)

IV. WHETHER THE ADMINISTRATIVE LAW JUDGE SHOULD HAVE APPLIED THE TEXAS STATUTE OF LIMITATIONS AND THE TEXAS TOLLING PROVISION TO MR. MORALES'S CLAIM, IN ACCORDANCE WITH THE BRANDLER DECISION

V. WHETHER THE CARRIER'S DEFENSE OF STATUTE OF LIMITATIONS WAS WAIVED BY THE CARRIER'S FAILURE TO RAISE SUCH DEFENSE AT THE FIRST HEARING IN TEXAS, AS REQUIRED BY A.R.S. [section] 23-1061(D)

VI. WHETHER MR. MORALES 'S CLAIM WAS TIMELY COMMENCED BY VIRTUE OF THE ARIZONA SAVINGS STATUTE (A.R.S. [section] 12-504(A)

VII. WHETHER SELECTIVE ENFORCEMENT OF THE ARIZONA WORKER'S COMPENSATION ACT VIOLATES ARTICLE XVIII, SECTION 8 OF THE ARIZONA CONSTITUTION, AND THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION

VIII. WHETHER THE FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION MANDATES THE APPLICATION OF THE TEXAS TOLLING PROVISION.

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STANDARD OF REVIEW

The issues presented by this appeal are issues of law reviewable de novo by this Court. Arizona Dep't of Public Safety v. Industrial Comm'n, 170 Ariz. 275, 823 P.2d 1283 (Ct. App. 1991); Anton v. Industrial

Commission, 141 Ariz. 566, 688 P.2d 192 (App. 1984). Moreover, in accordance with the constitutional and statutory mandates of the State of Arizona, this Court should liberally construe the Workers' Compensation Act in favor of the worker to effectuate its purpose of protecting its beneficiaries and compensating valid claims. Fullen v. Industrial Comm'n, 122 Ariz. 425, 595 P.2d 657 (1979); Pascucci v. Industrial Comm'n, 126 Ariz. 442, 444, 616 P.2d 902, 904 (Ct.App. 1980).

[page 21 of Petitioner's Opening Brief]

ARGUMENT VII

WHETHER SELECTIVE ENFORCEMENT OF THE ARIZONA WORKER'S COMPENSATION ACT VIOLATES ARTICLE XVIII, SECTION 8 OF THE ARIZONA CONSTITUTION, AND THE DUE PROCESS AND FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION

In Allen v. Industrial Comm'n of Arizona, 152 Ariz. 405, 733 P.2d 290 (Ariz. 1987), the Arizona Supreme Court upheld A.R.S. [section] 23-1061(A) as a constitutionally permissible reasonable regulation of Arizona's constitutionally mandated requirement to provide a "just and humane" method of providing compensation benefits to injured employees. Allen, 733 P.2d at 297. However, in reaching this conclusion, the Arizona Supreme Court emphasized that the statute "provides the claimant with a reasonable opportunity to file a claim." Id.

[next page]

An employer's failure to report the

injury, as required by the Act, constitutes grounds for tolling the one-year period, or postponing the period in which the claim has "accrued" for purposes of determining when the time period for filing the claim begins. Alternatively, if the employer's violation of its duty to report the injury does not have such effect, then A.R.S. [section] 23-1061(A), standing alone, no longer provides the claimant with such reasonable opportunity.

There exists no reasonable means from which Mr. Morales could have reasonably ascertained his right to benefits under Arizona law when, as in this case, his employer's violations of the same Act resulted in his failure to receive notice of any kind from any entity of such right.

If the Arizona Worker's Compensation Act fails to provide sanctions for an employer's notice violations of the provisions of the Act in a

manner consistent with sanctions for an employee's notice violations of the Act, the Act then fails maintain its status as a "reasonable regulation" of an employee's constitutionally protected right to a "just and humane" system of collecting benefits for employment related injuries. Accordingly, such inconsistent application of violations of the Act renders A.R.S. [section 23-1061(A) violative of the Arizona Constitution and accordingly unenforceable.

In addition, enforcing a one year limit on an employee's time in which to file a claim without imposing a similar penalty on an employer who violates the Act by failing to report the injury

[next page]

deprives the employee of "an opportunity . . . granted at a meaningful time and in a meaningful manner" for "[a] hearing

appropriate to the nature of the case", and is accordingly violative of the due process clause of the United States Constitution. Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982), Armstrong v. Manzo, 380 U.S. 549, 552 (1965).

ARGUMENT VIII

WHETHER THE FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION MANDATES THE APPLICATION OF THE TEXAS TOLLING PROVISION.

The United States Supreme Court has held that a forum state may apply its own statute of limitations to its judicial proceedings, consistent with the full faith and credit clause of the United States Constitution. Sun Oil Co. v. Wortman, 486 U.S. 717 (1988).

However, unlike the statute of limitations, where Arizona has expressed its legislative intent, Arizona law is silent with respect to the effect of an employer's failure to report his employee's injury. Conversely,

Texas law has expressly set forth the effects of an employer's failure to report, as set forth in Tex. Rev. Civ. Stat. Art. 8307, [section] 7a (Vernon 1986) (see infra, p. 12).

This case involves the denial of a claim to an employee hired and working in Texas for a Texas based company insured in Texas, licensed in Texas, qualified to do business in Texas and travel in Texas, driving a Texas registered vehicle on an interstate highway,

[next page]

who timely filed a claim for compensation benefits in Texas. When, as in this case, Arizona law is silent with respect to the effect of an employer's statutory notice violations, and Texas law has expressly set forth the effect for the same violation, the full faith and credit clause of the United States Constitution compels Arizona courts to recognize the Texas tolling provision as

binding and similarly recognize Mr. Morales's Arizona claim as timely filed.

APPENDIX G

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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ARTURO MORALES, Petitioner, vs. INDUSTRIAL COMMISSION OF ARIZONA, Respondent, HIDRO GAS, Defendant Employer, RELIANCE INSURANCE COMPANY, Respondent Carrier	X X X X X X X X X X X X X X X	I CA-IC ICA CLAIM NO. 92329241562 CARRIER CLAIM NO. 092-92-52278 **PETITION FOR REVIEW**

ARTURO MORALES petitions for review pursuant to Rule 23, ARCAP.

A. SYNOPSIS OF THE COURT OF APPEALS DECISION

1. STATEMENT OF THE CASE

On July 18, 1990, Arturo Morales sustained an industrial injury within the State of Arizona. On November 23, 1992, Mr. Morales filed a Workers' Report of Injury with the Industrial Commission of Arizona. On April 5, 1993, the Respondent Carrier,

[next page]
Reliance Insurance Company, denied the claim. Mr. Morales filed a timely Request for Hearing. Before the hearing, the carrier raised the jurisdictional issue.

Hearing was convened on November 15, 1993 in Phoenix, Arizona. On December 7, 1993, the Administrative Law Judge, Honorable Joanna C. Gaffaney, rendered her Decision Upon Hearing and Finding and Award Denying Compensability, in which Judge Gaffney denied compensability for lack of jurisdiction.

On January 6, 1994, Mr. Morales filed a Request for Review On January 21, 1994, the Defendant Employer, Hidro Gas Juarez, S.A. and Defendant Carrier, Reliance Insurance Company, filed their Response to Request for Review. On February 1, 1994, Judge Gaffney rendered her Decision Upon Review, affirming the Decision Upon Hearing. The Petitioner appealed.

On May 30, 1995, the Arizona Court of Appeals, Division One, issued its Memorandum Decision affirming the decision of the Administrative Law Judge. A copy of the Memorandum Decision is attached to this Petition for Review.

2. THE COURT OF APPEALS DECISION

The Court of Appeals held that the Arizona limitations applied to Petitioner's claim for worker's compensation benefits. (Decision (Appendix "A"), at pp. 9-10). The

Court of Appeals also ruled that the Full Faith and Credit clause of the United States Constitution did not compel the Arizona A.L.J. to apply the Texas limitations period and savings statute to the Arizona claim. (Decision, at p. 11). The Court of Appeals did not rule on the

[next page]

Petitioner's rehearing issues, on the grounds that such issues were not preserved for relief on appeal. (Decision, at pp. 7-9).

B. ISSUES PRESENTED FOR REVIEW

(1) Should the Arizona ALJ apply the Texas limitations (and tolling) period to Mr. Morales' claim for Arizona worker's compensation benefits?

(2) Does the Arizona Worker's Compensation Act's failure to provide sanction for an employer's notice violations in a manner similar to sanctions for employee

notice requirements violate the Arizona and United States Constitutions?

(3) Should the Court of Appeals have ruled on other issues raised by the Petitioner on appeal?

C. FACTS MATERIAL TO THE ISSUES

On July 18, 1990, Arturo Morales, while in the course and scope of his employment as a truck driver with Hidro Gas Juarez S.A. was involved in a vehicular accident on the Interstate Highway near Gila Bend, Arizona. [R.T. (Appendix "B"), p. 9:10-20.] Mr. Morales suffered severe and extensive injuries as a result of the accident, including injuries to his knee, hip, waist, ribs, shoulder, and neck. [R.T., p. 10:19-21.] He remained in an Arizona hospital for approximately seven days following the accident, and remained immobile for approximately one year following the accident.

[R.T., p. 12:12-16.]

At the time of the accident, Mr. Morales was a resident of Juarez, Chihuahua, Mexico and a citizen of the Republic of Mexico. [R.T. 11:22-25.] Mr. Morales was hired in 1983 by his employer,

[next page]

Hidro Gas Juarez, to work in Texas. [R.T., p. 8:13-21.] Hidro Gas Juarez maintained an office in El Paso, Texas. Hidro Gas Juarez recruited Mr. Morales from Texas, for work in Texas. [R.T., p. 8:29-9:4.] Mr. Morales worked in Texas for Hidro Gas Juarez for between five and six years. [R.T., p. 19:19-21.]

Mr. Morales obtained a Texas driver's license at the direction of Hidro Gas Juarez in order to work for them. [r.T., p. 15:17-20.] The trucks Mr. Morales drove for Hidro Gas Juarez had Texas license plates. [R.T.

17:19-21.] His employer also maintained offices in El Paso, Texas. [R.T., p. 17:22-24.]

Hidro Gas Juarez maintains no office in Arizona. [R.T., p. 14:14-16.] Mr. Morales had driven to Arizona only to pick up butane gas from AmeriGas Refinery, a supplier in Peoria, Arizona, and return with the butane gas to Tijuana, Mexico. [R.T., p. 10:7-10; 14:21-15:1.]

Mr. Morales' employer, Hidro Gas, did not report the injury to the Arizona Industrial Commission. Indeed, Hidro Gas **to this day** has yet to file any written notice of the injury to the Commission.

Hidro Gas also never reported the injury to its carrier, Reliance Insurance Company. Hidro Gas also never provided Mr. Morales with notice of existence of worker's compensation insurance, the identify of its carrier or

policy number.

On November 6, 1991, Mr. Morales timely filed a notice of claim for worker's compensation benefits in Texas. Mr. Morales subsequently filed suit against his employer's carrier (named Planet Insurance in the Texas proceeding), appealing the award of

[next page]
the Texas Worker's Compensation Commission, seeking benefits pursuant to the Texas Worker's Compensation Act, in Cause Number 92-7126, such case falling in the 41st Judicial District, El Paso County, Texas. By order signed January 25, 1993, the case was consolidated into Cause No. 91-12057.

The Texas trial court subsequently granted summary judgment in favor of the carrier, on the grounds that the Texas Worker's Compensation Act failed to provide the Texas court with jurisdiction to

adjudicate Mr. Morales' claim because the injury occurred outside Texas and Mr. Morales was not a Texas resident. Mr. Morales has appealed the ruling. Such appeal is presently pending as No. 08-94-00053-CV in the Court of Appeals for the Eight Court of Appeals District of Texas at El Paso, styled Arturo Morales, Appellant, v. Hidro Gas Juarez and Planet Insurance Company, Appellees.

C.REASONS WHY THIS PETITION SHOULD BE GRANTED

1. **Important Issues of Law Have Been Incorrectly Decided -- The Court of Appeals' Decision is Contrary to Court Opinions in the Brandler Decision and the Quiles Decision.**

2. **Public Policy Considerations Require That Arizona Recognize a Worker's Compliance with Notice Requirements in the State of the Employer's Principal Place of Business as Proper Notice for Obtaining Compensation Benefits Under Arizona Law.**

3. **The Case Concerns Important Questions That Should be Settled for Future Cases.**

4. **The Supreme Court's Ruling as to the Constitutionality of A.R.S. [section] 23-1061(A) Should be Modified.**

[page 10 of Petitioner's Petition for Review]

(b) Constitutionality of the Arizona Worker's Compensation Act.

In Allen v. Industrial Comm'n of Arizona, 152 Ariz. 405, 733 P.2d 290 (Ariz. 1987), the Arizona Supreme Court upheld A.R.S. [section] 23-1061(A) as a constitutionally permissible reasonable regulation of Arizona's constitutionally mandated requirement to provide a "just and humane" method of providing compensation benefits to injured employees. Allen, 733 P.2d at 297. However, in reaching this conclusion, the Arizona Supreme Court emphasized that the statute "provides the claimant with a reasonable opportunity to file a claim." Id.

However, a statute may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right even though its general

validity is beyond question. Boddie v. Connecticut, 401 U.S. 371, 379 (1971). Thus, even if [section] 23-1061

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(A) is considered a reasonable regulation in general application, as applied to Mr. Morales, the one year limitations period, without a tolling provision while the same is pending in a foreign jurisdiction, operates to deprive him of his due process right to a hearing and must therefore be held invalid.

Moreover, if the Arizona Worker's Compensation Act fails to provide sanctions for an employer's notice violations of the provisions of the Act in a manner consistent with sanctions for an employee's notice violations of the Act, the Act then fails to maintain its status as a "reasonable regulation" of an employee's constitutionally protected right to a "just and humane" system

of collecting benefits for employment related injuries. Accordingly, such inconsistent application of violations of the Act renders A.R.S. [section] 23-1061(A) violative of the Arizona Constitution and accordingly unenforceable.

In addition, enforcing a one year limit on an employee's time in which to file a claim without imposing a similar penalty on an employer who violates the Act by failing to report the injury deprives the employee of "an opportunity . . . granted at a meaningful time and in a meaningful manner" for [a] hearing appropriate to the nature of the case", and is accordingly violative of the due process clause of the United States Constitution. Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982), Armstrong v. Manzo, 380 U.S. 549, 552 (1965).

D. PRESERVATION OF ISSUES FOR APPEAL.

The Court of Appeals declined to rule on the following issues

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presented by the Petitioner:

1. Whether the employer's failure to report the accident to its carrier and the commission in violation of A.R.S. [section] 23-908(E) and 23-908(F) constitutes a material misrepresentation, thereby tolling the statute of limitations pursuant to A.R.S. [section] 23-1061(A); or

   Alternatively, whether, since the employer failed to report the accident to the Commission in violation of A.R.S. [section] 23-908(E), Mr. Morales' claim was "compensable" or the claim "accrued" under Arizona law only when the employer reports the injury in accordance with A.R.S. [section] 23-908(E) and 23-908(F);

2. Whether the Administrative Law Judge should have applied Texas law to Mr. Morales' claim, pursuant to A.R.S. [section] 23-904(B);

3. Whether the carrier's defense of statute of limitations was waived by the carrier's failure to raise such defense at the first hearing in Texas, as required by A.R.S. [section] 23-1061(D);

4. Whether Mr. Morales' claim was timely commenced by virtue of the Arizona Savings Statute (A.R.S. [section] 12-504(A); and

5. Whether selective enforcement of the Arizona Worker's Compensation Act violates Article XVIII, Section 8 of the Arizona Constitution, and the due process clause of the United States Constitution.

The Court of Appeals ruled that the Ruth exception was inapplicable with respect to these issues. [Decision, at pp. 8-9.] However, the Ruth exception at a minimum applies to the Petitioner's constitutional claims. See also, Barrio v. San Manuel Division Hospital, 692 P.2d 280 (Ariz. 1984).

Moreover, the exception is particularly applicable "if the issues do not turn on disputed evidence and do not require the court to determine additional facts." Rubens v. Costello, 251 P.2d 306 (Ariz. 1952); and Resolution Trust Corp. v. Foust, 869 P.2d 183 (Ariz. App. Div. 1993).

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This is precisely the case presented by this Appeal. The Respondent employer does not contest its failure to comply with the employer notice provisions of the Act. All of the issues presented by the Petitioner turn on the legal significance of the employer's failure to comply with its notice requirements. For this reason, and because of the general interest of the State of Arizona in determining the rights of all workers affected by the court's interpretation of the Arizona Workers' Compensation Statute, the Petitioner's issues presented by this appeal should be reviewed and ruled upon.

Finally, Morales requests that this Court exercise its discretionary power (Rule 23(i)(3), ARCAP) and decide <u>all</u> of the remaining issues in this case which have been fully preserved and briefed.

Morales requests an award of his costs

and attorney's fees incurred in this appeal, pursuant to Rule 21(c), ARCAP, and A.R.S. [section] 12-341.01.

[next page]

Respectfully submitted this 28 day of June, 1995.

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